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No. 95-1605

In the Supreme Court of the United States

OCTOBER TERM, 1996

UNITED STATES OF AMERICA, PETITIONER

v.

MIGUEL GONZALES, ORLENIS HERNANDEZ-DIAZ, AND MARIO PEREZ

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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Respondents have largely departed from the reasoning of the court of appeals, the only court that has accepted their view on the question presented by the petition. Instead, respondents now offer three new reasons to support their contention that sentences under Section 924(c) (18 U.S.C.) are required to run consecutively only with *federal* terms of imprisonment, not *state* terms of imprisonment. First, respondents argue that, based on the context and background of Section 924(c), Congress would have specified "federal and state" sentences if it had meant to cover both, rather than mandating that Section 924(c)'s prison terms "shall not * * * run concurrently with *any* other term of imprisonment." Sec-

ond, respondents suggest that a "clear statement" principle, applicable when Congress preempts or intrudes on state law, requires that the phrase "state sentence" appear in Section 924(c) before Congress may be deemed to have required a federal sentence to run consecutively with a state sentence. Third, respondents rely on the rule of lenity. None of those arguments has merit.

1. a. Respondents' principal textual argument (Resp. Br. 6-12) is that Section 924(c) should be read in the "context" of other statutes in which Congress has used the phrase "any federal or state" rather than the single word "any." According to respondents, an express reference to the States is the "customary" and "typical[]" locution (Resp. Br. 9) invoked by Congress when it desires to reach a class that includes state, as well as federal, subjects. This Court's cases, however, have recognized no such rule. See *United States* v. *Alvarez-Sanchez*, 114 S. Ct. 1599, 1604 (1994) (federal statute that refers to an arrest made by "any law enforcement officer" includes "federal, state, or local" officers); *The Collector* v. *Hubbard*, 79 U.S. (12 Wall.) 1, 15 (1870) (statute forbidding filing suit "in any court" makes it "quite clear that it includes the State courts as well as the Federal courts," because "there is not a word in the [statute] tending to show that the words 'in any court' are not used in their ordinary sense"); Gov't Br. 12-13. Congress is well aware that state courts, like their federal counterparts, impose sentences of imprisonment. *Callanan* v. *United States*, 364 U.S. 587, 594 (1961) (Congress is familiar with "the commonplaces of our law"). The legislature's use of the phrase "any other term of imprisonment" thus naturally refers to both state and federal sentences.

Respondents note (Br. 8-10) that in some other contexts, Congress has explicitly referred to "federal or state" sentences. Those statutory settings, however, required that language to clarify their scope.[1] They shed no light on the meaning of Section 924(c), whose broad reference to "any other term of imprisonment" is plain on its face. *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469, 480 (1992) ("The plain meaning of [a statutory provision] cannot be altered by the use of a somewhat different term in another part of the statute."). That conclusion gains added force when Section 924(c) is compared with 18 U.S.C. 3584(a), the statute that sets forth the general rule that federal courts have discretion to impose con-

[1] Respondents place particular reliance (Resp. Br. 8-9) on several provisions of 18 U.S.C. 924 in which Congress expressly referred to State law. In each instance cited by respondents, however, Section 924 refers to a subset of state and federal law, making it necessary to specify the precise contours of each component. For example, 18 U.S.C. 924(g) prohibits interstate firearm transfers performed with an intent to engage in conduct that would violate either the federal Controlled Substances Act or "any State law relating to any controlled substance (as defined in section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6))." Similarly, 18 U.S.C. 924(e)(2)(A)(ii) defines the term "serious drug offense" to include "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law." And 18 U.S.C. 924(a)(5)(A)(ii)(II) precludes federal courts from imposing on a juvenile a sentence of probation if the juvenile has been convicted of "an offense under section 922(x) or a similar State law." In contrast, Section 924(c) broadly prohibits federal courts from imposing a sentence that would run concurrently with "any other term of imprisonment."

current or consecutive sentences. Section 3584(a), like Section 924(c), contains no reference to state sentences; it refers simply to a defendant's "undischarged term of imprisonment."[2] Yet Section 3584(a) has been universally construed to authorize a sentencing court to run a new sentence concurrently or consecutively with any other sentence, whether state or federal. *United States* v. *Adair*, 826 F.2d 1040, 1041 (11th Cir. 1987) (per curiam) ("[W]e find that it is within the district court's power to order that a federal sentence not begin until the completion of a state sentence."); *United States* v. *Gullickson*, 981 F.2d 344, 349 (8th Cir. 1992); *United States* v *D'Iguillont*, 979 F.2d 612, 613, 615 (7th Cir. 1992), cert. denied, 507 U.S. 1040 (1993); see also *United States* v. *Hardesty*, 958 F.2d 910, 912-914 (collecting cases), aff'd en banc, 977 F.2d 1347 (9th Cir. 1992).[3] Because Section 3584(a), like the relevant language in Section

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[2] Section 3584(a) states in pertinent part:

> **(a) Imposition of Concurrent or Consecutive Terms.**— If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant *who is already subject to an undischarged term of imprisonment*, the terms may run concurrently or consecutively.

18 U.S.C. 3584(a) (emphasis added).

[3] The courts of appeals have differed on the extent to which the Sentencing Guidelines limit a sentencing court's discretion under Section 3584(a) to make the consecutive-versus-concurrent determination. See *United States* v. *Vega*, 11 F.3d 309, 314-315 (2d Cir. 1993) (collecting cases); *United States* v. *Flowers*, 995 F.2d 315, 316 (1st Cir. 1993) (Breyer, C.J.) (same). But no court has suggested that sentencing courts lack all discretion under Section 3854 to make a sentence consecutive to a state sentence.

924(c), addresses the issue of consecutive sentencing, its application to state sentences without an explicit mention of them is highly significant.

The history of Section 3584(a) reinforces that point. Section 3584(a) was enacted in the 1984 legislation that also amended Section 924(c).[4] In the Senate Report accompanying the bill, the Judiciary Committee explained that under then-existing law, a federal sentence "imposed on a person already serving a prison term is deemed to be concurrent with the first sentence if the first sentence is for a federal offense, but is usually served after the first sentence if that sentence involves imprisonment for a State or local offense." S. Rep. No. 225, 98th Cong., 2d Sess. 126 (1983) (footnotes omitted). The Committee noted that Section 3584(a) would change current law for "a person sentenced for a Federal offense who is already serving a term of imprisonment for a State offense," by generally departing from the requirement that federal sentences always be made consecutive to state sentences, and instead permitting a sentencing court to impose a consecutive *or* a concurrent sentence. S. Rep. No. 225, *supra*, at 127. Significantly, the Report refers to Section 924(c) as an exception to the rule in Section 3584(a) that "if the court is silent as to whether sentences to terms of imprisonment imposed at the same time are concurrent or consecutive, the terms run concurrently." S. Rep. No. 225, *supra*, at 127 & n. 313. The legislative history thus reveals

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[4] Section 3584 was enacted in the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Tit. II, § 212(a)(2), 98 Stat. 2000. The amendments to Section 924(c) that made its consecutive-sentencing mandate applicable to prior state sentences were part of the same legislation. Gov't Br. 21-22.

three significant points: first, the background rule (before Section 3584(a)) was that federal sentences ran *consecutively* to state sentences; second, Congress understood that Section 3584(a)'s unadorned reference to an "undischarged term of imprisonment" being served by a prisoner at the time of his federal sentencing includes state as well as federal sentences; and, third, Congress understood that the mandatory consecutive-sentencing feature of Section 924(c) was an exception to the general rule of discretion afforded under Section 3584(a).[5]

Respondents' contention that a statute must employ the word "state" in order to refer to state-law

[5] Because Section 3584(a) is the most relevant comparison for assessing the scope of Section 924(c)'s consecutive-sentencing provision, respondents are not helped by the fact that two other provisions of the Comprehensive Crime Control Act of 1984 expressly refer to state sentences. See 18 U.S.C. 3564(b) (probation sentence runs concurrently with other sentences); 18 U.S.C. 3624(e) (same for supervised release). In any event, the Comprehensive Crime Control Act is hardly a model of consistency in its terminology. At least two other of its provisions do not employ the term "state," yet even the court below would agree that they plainly include prior state sentences. See 18 U.S.C. 3146(b)(2) (providing that the mandatory punishment for bail jumping "shall be consecutive to the sentence of imprisonment for any other offense"); 18 U.S.C. 3147 (providing that the punishment for offenses committed while on bail "shall be consecutive to any other sentence of imprisonment"); *United States* v. *McCary*, 58 F.3d 521, 524 (10th Cir. 1995) (Section 3147 "clear[ly] and unambiguous[ly]" requires a sentence consecutive to any state or federal sentence); *United States* v. *Kalady*, 941 F.2d 1090, 1097 (9th Cir. 1991). Thus, if any lesson emerges from Congress's usage in the 1984 Act, it is that respondents are incorrect in suggesting (Resp. Br. 9) that Congress has a settled practice or custom of referring to the States expressly in federal criminal statutes.

subjects cannot be reconciled with their view (Resp. Br. 21 & nn.13, 14; see also NACDL Br. 15-21) that they should have been sentenced under 18 U.S.C. 3584(a), and the Guideline that implements that statute. See Guidelines § 5G1.3. Section 3584(a) does not expressly refer to state sentences, but, as respondents acknowledge, it applies to state sentences. Respondents are thus left with no sound basis for arguing that Section 924(c) should be construed otherwise. In any event, respondents' claim that they should be sentenced under Section 3584(a) and Guidelines § 5G1.3 cannot be reconciled with the introductory clause of Section 924(c)'s sentencing provision. That clause provides that the requirement of consecutive sentencing in Section 924(c) applies "[n]otwithstanding any other provision of law."

There is no greater merit to Amicus NACDL's argument (NACDL Br. 6-15) that the unqualified phrase "any term of imprisonment" excludes not only state sentences, but also all previously imposed *federal* sentences. In the NACDL's view, Congress's use of the word "imposed" in Section 924(c) suggests that the prohibition on concurrent sentences applies only to other terms of imprisonment "imposed" when the defendant is sentenced for the Section 924(c) offense. The problem with that argument is that Section 924(c) does not say that Section 924(c) sentences may not run concurrently with other sentences imposed at the same time; it instead forbids the sentencing court from running the Section 924(c) sentence concurrently with "any other" sentence "*including*" any sentence imposed for the underlying crimes in which the firearm was used or carried. See *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941) ("the term 'including' is not one of

all-embracing definition, but connotes simply an illustrative application of the general principle"). Amicus' argument would turn Section 924(c)'s broad proscription on its head.

b. Respondents recognize that the legislative history provides no evidence that Congress intended to exclude previously imposed state terms of imprisonment from Section 924(c)'s categorical prohibition of concurrent sentences. They claim, however, that the legislative history's "silence is compelling evidence that Congress did not intend to change pre-1984 law by expanding the section to cover state prison terms." Resp. Br. 14. As this Court has emphasized, however, "[t]he 'strong presumption' that the plain language of the statute expresses congressional intent is rebutted only in 'rare and exceptional circumstances' * * * when a contrary legislative intent *is clearly expressed*." *Ardestani* v. *INS*, 502 U.S. 129, 135-36 (1991) (quoting *Rubin* v. *United States*, 449 U.S. 424, 430 (1981) (emphasis added)). The failure to make specific mention of "state sentences" in the legislative history does not meet that standard. Rather, as this Court has repeatedly emphasized, "[i]t is not the law that a statute can have no effects which are not explicitly mentioned in its legislative history." *Pittston Coal Group* v. *Sebben*, 488 U.S. 105, 115 (1988); see also *Moskal* v. *United States*, 498 U.S. 103, 111 (1990) ("This Court has never required that every permissible application of a statute be expressly referred to in its legislative history.").

Respondents place some weight on the "sentence order specification" (Resp. Br. 15 n.6) in the Senate Committee report, *i.e.*, the statement that sentences under Section 924(c) should be served before the start of any other sentences. S. Rep. No. 225, *supra*, at 313.

As we pointed out in our opening brief (Gov't Br. 23-25), that statement does not purport to explain any language in Section 924(c), and thus is entitled to no weight in construing that provision. Respondents fail to address this Court's cases refusing to give effect to legislative history that is "in no way anchored in the text of the statute" (*Shannon* v. *United States*, 114 S. Ct. 2419, 2426 (1994)). Moreover, respondents themselves recognize that the "sentence order specification in Section 924(c)'s legislative history" cannot be taken literally, because it would imply that a Section 924(c) sentence may run concurrently with a *federal* sentence that the defendant might be serving—a suggestion respondents decline to defend. See Resp. Br. 15 n.6 (arguing that the legislative history may have no weight in resolving that question, since it does not implicate "state prerogatives"). The fact that the legislative history gives no consistent guide to the application of Section 924(c) underscores that, as respondents concede (*ibid.*), "it is ultimately the language of the statute that must be construed."[6]

2. Respondents contend (Resp. Br. 15-22) "that Congress failed to satisfy * * * 'clear statement' requirements" that apply when a federal statute either "preempts state law" (*id.* at 15) or alters "the

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[6] Amicus NACDL contends (NADCL Br. 9-15) that the legislative history of the 1984 amendments establishes the wholly "federal focus" of Section 924(c). The passages on which Amicus NADCL relies, however, merely reflect what the text of Section 924(c) makes explicit, *i.e.*, that Section 924(c) is violated by using or carrying a firearm in relation to certain predicate federal crimes. In contrast to the explicit requirement that the *predicate* offense be a federal crime, the text of Section 924(c) imposes no parallel requirement with respect the prohibition on concurrent sentences.

federal-state balance" by "render[ing] traditionally local criminal conduct a matter for federal enforcement." *Id.* at 20, quoting *United States* v. *Bass*, 404 U.S. 336, 350 (1971). There is no basis for invoking a "clear statement" principle here.

Section 924(c) does not affect, much less "preempt," state authority in any way. Section 924(c)'s prohibition on concurrent sentences instead addresses a purely federal question: how federal courts should impose sentences on defendants convicted of committing a federal crime. Section 924(c) answers that question by establishing a mandatory sentence and by further mandating that the sentence must not run concurrently with "any other term of imprisonment." It does not, as respondents suggest (Resp. Br. 17-18), interfere with the ability of state courts to impose a concurrent sentence when a defendant is sentenced in federal court first, before being sentenced for a state crime. The language of Section 924(c) addresses how a federal court should impose sentence on a defendant convicted under that subsection; in contrast to the provisions cited by respondents (see Resp. Br. 18 n.10), Section 924(c) does not speak at all to how state courts that might *later* sentence the defendant for state crimes should exercise their authority.[7] As a

[7] In case there could be any doubt, 18 U.S.C. 927 expressly disclaims any congressional intent to preempt state law. Section 927 provides:

> No provision of this chapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which such provision operates to the exclusion of the law of any State on the same subject matter, unless there is a direct and positive conflict between such provision and the law of the State so that the two cannot be reconciled or consistently stand together.

result, state judges remain entirely free to apply state rules of concurrency when they impose sentences under state law. They simply cannot prevent federal courts that might later sentence the defendant from directing that the new federal sentence must result in additional time in prison above and beyond that already imposed by the state sentence.

Section 924(c) also does not disturb the federal-state balance. "[T]here is no question that Congress intended to define as a federal crime conduct that it knew was punishable under state law." *United States* v. *Culbert*, 435 U.S. 371, 379 (1978). But Section 924(c) imposes no restrictions on state criminal justice systems; "the States remain free to exercise their police powers to the fullest constitutional extent in defining and prosecuting crimes within their respective jurisdictions." *United States* v. *Turkette*, 452 U.S. 576, 586 n.9 (1981). All Section 924(c) does is to mandate for one particular federal crime a requirement of consecutive sentencing that traditionally was the norm for all crimes in the federal system. See S. Rep. No. 225, *supra*, at 126 (noting that federal sentences were generally made consecutive to prior state sentences); *United States* v. *Hardesty*, 958 F.2d at 912-913. State courts have never had the authority to provide that later-sentencing federal courts may not impose incremental punishment on conduct that already has been punished in state court. See, *e.g.*, *Pinaud* v. *James*, 851 F.2d 27, 30 (2d Cir. 1988) ("[E]ven if the state sentence has been imposed with the expectation that it will be served concurrently with a yet-to-be imposed federal sentence, the federal court need not make its sentence concurrent with the state sentence but remains free to make the federal sentence consecutive."); accord *United States* v.

Smith, 972 F.2d 243, 244 (8th Cir. 1992); *Thomas* v. *Whalen*, 962 F.2d 358, 362 (4th Cir. 1992), cert. denied, 507 U.S. 936 (1993); *Meagher* v. *Clark*, 943 F.2d 1277, 1282 (11th Cir. 1991). Construing Section 924(c) to require that sentences be consecutive to other state as well as federal sentences thus breaks no new ground.[8]

In any event, even if "clear statement" principles did apply, the language of Section 924(c) meets the standard of clarity. As we have demonstrated (Gov't

[8] There is no merit to amicus NACDL's novel argument (NACDL Br. 21-25) that the "dual sovereignty" doctrine precludes a federal court from imposing a consecutive sentence when state law would require a concurrent sentence. Far from being dictated by the "dual sovereignty" doctrine, amicus' argument is refuted by that doctrine. The essence of the "dual sovereignty" doctrine is that each sovereign may criminalize and punish the same conduct as it sees fit, see, *e.g.*, *Heath* v. *Alabama*, 474 U.S. 82, 89 (1986); *Abbate* v. *United States*, 359 U.S. 187, 195 (1959); *United States* v. *Lanza*, 260 U.S. 377, 382 (1922); *Southern R.R.* v. *Railroad Comm'n*, 236 U.S. 439, 445 (1915); *Moore* v. *Illinois*, 55 U.S. (14 How.) 13, 20 (1852), not the opposite principle that a State's assessment of the gravity of criminal conduct binds the federal government in the enforcement of its own laws.

With respect to amicus' suggestion that the prosecution of respondents violated internal Department of Justice (DOJ) policies (NACDL Br. 27-29), it suffices to say that respondents themselves have abandoned any such claim (see, *e.g.*, *Reno* v. *Koray*, 115 S. Ct. 2021, 2024 n.2 (1995)), that the policy, even when it applies, requires nothing more than internal authorization of the successive federal prosecution (see United States Attorneys' Manual § 9-2.142), which was obtained in this case, and that internal DOJ policies confer no enforceable rights on criminal defendants (see, *e.g.*, United States Attorneys' Manual § 1-1.100; *United States* v. *Carson*, 969 F.2d 1480, 1495 n.8 (3d Cir. 1992); *United States* v. *Senibaldi*, 959 F.2d 1131, 1136 (1st Cir. 1992)).

Br. 11-19), that language can only be read as forbidding a Section 924(c) sentence that will run concurrently with *any* previously imposed "term of imprisonment." No argument advanced by respondents establishes otherwise.

3. Finally, respondents contend (Br. 22-23) that their alternative interpretation of the statutory language is at least sufficient to show that our "position is not unambiguously correct," and thus to invoke the rule of lenity. That is incorrect. This Court has emphasized repeatedly that the rule of lenity only applies when there is a "grievous ambiguity or uncertainty in the language and structure of the Act," *Huddleston* v. *United States*, 415 U.S. 814, 831 (1974); see also *Reno* v. *Koray*, 115 S. Ct. 2021, 2029 (1995), and does not come into play "merely because it [is] *possible* to articulate a more narrow construction than that urged by the Government," *Moskal* v. *United States*, 498 U.S. at 108 (emphasis in original). As we have explained, and as every court of appeals to consider the question save for the court below has concluded, the text of Section 924(c)'s sentencing provision unambiguously directs that the sentence must be made consecutive to any other sentence that the defendant might be serving.

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For the foregoing reasons, and for the reasons set forth in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Acting Solicitor General

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